

LOCAL HIRE LAWS: ALASKA'S FUTILE ATTEMPTS AT PREFERENTIAL TREATMENT

I. INTRODUCTION

Laws granting state residents¹ preferential treatment in public construction employment are a recurring legislative event in Alaska.² The popularity of such laws stems in large part from the unique condition of Alaska's labor market. Alaska has one of the highest unemployment rates and most seasonal economies in the United States.³ Moreover, the state's job market is unusually dependent upon the construction industry.⁴ In addition, nonresidents as a group do not return their wages to the Alaska economy to the same extent as residents.⁵

Many nonresidents viewed Alaska as an attractive source of employment when the Trans-Alaska Pipeline and accompanying revenues spurred the growth of the state's economy.⁶ The increased demand for labor in Alaska, combined with the then existing national recession, brought an influx of nonresidents to the state.⁷ Although no proof existed that the nonresident workers threatened the employment prospects of Alaskans,⁸ the legislature nevertheless enacted employment preference acts, popularly known as local hire laws, to prevent

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1. An Alaska "resident" is one who is "physically present . . . with the intent to remain . . . indefinitely and to make a home in the state." ALASKA STAT. § 01.10.055(a) (Supp. 1987).

2. See, e.g., ALASKA STAT. §§ 36.10.005-.990 (Supp. 1986); *id.* § 36.10.010 (repealed 1986); *id.* § 38.40.030 (repealed 1980).

3. ALASKA DEP'T OF LABOR, NONRESIDENTS WORKING IN ALASKA (1987) [hereinafter LABOR REPORT]. In 1985 Alaska had the fifth highest overall unemployment rate in the United States. *Id.* at 15.

4. *Id.* Construction provided 8% of Alaska's jobs in 1985, but in the United States as a whole, construction provided only 4.7% of jobs. *Id.* at 19.

5. *Id.* In 1985, 58% of all residents worked during all four calendar quarters, whereas only 11% of nonresidents worked during all four quarters. *Id.* at 20. Because nonresidents work fewer quarters in Alaska and receive a much higher portion of their unemployment benefits while residing in other states, see *infra* note 13, it is reasonable to assume that the nonresident spends more time outside Alaska and consequently spends more of his salary outside Alaska than the resident, thus giving less benefit to Alaska's economy, especially since Alaska has no state income tax. *Id.* at 41.

6. ALASKA DEP'T OF LABOR, NONRESIDENTS WORKING IN ALASKA 41 (1986).

7. *Id.*

8. *Id.*

nonresidents from "tak[ing] jobs which otherwise would to [sic] to Alaskan residents."⁹

Despite decreasing oil revenue¹⁰ and high unemployment,¹¹ Alaska still has a large percentage of nonresident workers. In 1985, twelve percent of all wages paid in Alaska were paid to nonresidents, who accounted for twenty-three percent of the Alaska work force.¹² Furthermore, in 1985, Alaska led the nation in the percentage of state unemployment compensation payments sent to employees out of state.¹³ Seventy-four percent of the out-of-state payments went to nonresidents.¹⁴ Consequently, Alaska legislators have not lost their fervor for local hire laws.

Alaska has made three attempts to establish a policy of preferential hire for its residents. The first statute to reach the courts was enacted in 1972, immediately before construction began on the Trans-Alaska Pipeline.¹⁵ The statute, ("Alaska Hire"), provided an employment preference for Alaska residents to work on oil and gas projects resulting from leases with the state.¹⁶ The United States Supreme Court subsequently declared this statute unconstitutional in *Hicklin v. Orbeck*.¹⁷ Another statute, which predated Alaska Hire but was litigated after the *Hicklin* decision, required that ninety-five percent of the entire workforce on state-funded construction projects be Alaska residents, if such residents were qualified and available.¹⁸ Finding *Hicklin* controlling, the Alaska Supreme Court declared this statute unconstitutional in *Robison v. Francis*.¹⁹ Finally, in 1986, the Alaska Legislature adopted a local hire law more narrowly tailored than those

9. See *Robison v. Francis*, 713 P.2d 259, 265 (Alaska 1986).

10. For example, the State of Alaska General Fund's unrestricted revenues, of which 80% is oil revenue, has decreased from \$3.1 billion in 1986 to a projected \$1.7 billion in 1987. Telephone interview with Bob Elliott, Research Analyst, Department of Revenues (Sept. 14, 1987).

11. Alaska's overall unemployment rate rose from 9.6% in 1985 to 10.9% in 1986. Telephone interview with John Boucher, Economist, Alaska Department of Labor (Sept. 14, 1987).

12. LABOR REPORT, *supra* note 3, at 20.

13. *Id.* at 41. Almost 22% of all regular unemployment insurance benefits paid by Alaska in 1985 were interstate payments. The national average was 4.8%. *Id.*

14. *Id.*

15. Boucher, *Resident and Nonresident Employment in Alaska*, 5 ALASKA ECONOMIC TRENDS 1 (1985).

16. ALASKA STAT. § 38.40.030 (repealed 1980).

17. 437 U.S. 518 (1978).

18. ALASKA STAT. § 36.10.010 (repealed 1986).

19. 713 P.2d 259 (Alaska 1986).

found unconstitutional in *Hicklin* and *Francis*.²⁰ The new statute allows preferential treatment for certain residents of "zones of underemployment" and "economically distressed zones" within Alaska.²¹ This statute has not yet been tested before the Alaska Supreme Court.

This note focuses on the constitutionality of local hire laws, a controversial issue both inside and outside Alaska. The note first analyzes United States Supreme Court rulings on resident preference laws. Next it examines positions that other state courts have adopted regarding the constitutionality of laws favoring resident workers. The third part scrutinizes the local hire laws enacted by the Alaska Legislature and examines how these laws have been treated by Alaska courts. Finally, this note evaluates the constitutionality of Alaska's most recent resident preference law, and concludes that this law, like its predecessors, violates the privileges and immunities clause of article IV of the United States Constitution and may violate the equal protection clause of Alaska's Constitution.

II. DECISIONS OF THE UNITED STATES SUPREME COURT

The United States Supreme Court has entertained many challenges to the constitutionality of local hire laws.²² Challengers have attacked local hire laws under the equal protection clause, the commerce clause, and the privileges and immunities clause of article IV.²³

20. ALASKA STAT. §§ 36.10.005-.990 (1987).

21. *Id.*

22. See, e.g., *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983); *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

23. The plaintiffs in *Robison v. Francis*, 713 P.2d 259 (Alaska 1986), also challenged the local hire law under the fourteenth amendment privileges and immunities clause, which prohibits states from creating laws that would abridge "the privileges and immunities of the citizens of the United States." U.S. CONST. amend. XIV, § 1. This clause, however, is an unlikely route for such a challenge. In the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court held that the privileges and immunities clause of the fourteenth amendment protects only such rights as are inherent in federal citizenship. Later cases have severely limited these rights, which include petitioning Congress, voting in federal elections, and traveling interstate. See *Twining v. New Jersey*, 211 U.S. 78 (1908); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-4, at 423 (1978). Professor Tribe warns that one should "treat the clause as alive and technically robust." *Id.* at 426. However, the Court has only found one state to have violated the clause, a decision which it overruled within a few years. See 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW* § 14.3, at 8 (1986) (citing *Colgate v. Harvey*, 296 U.S. 404 (1935), *overruled in* *Madden v. Kentucky*, 309 U.S. 83 (1940)).

In this note, discussion of the privileges and immunities clause refers to the article IV privileges and immunities clause unless otherwise stated.

Currently, only the privileges and immunities clause of article IV provides litigants with a sound basis to argue for the invalidation of a local hire statute.²⁴

24. The Supreme Court has severely limited the applicability of the equal protection clause to local hire laws. The equal protection clause is concerned with government classifications that distinguish between persons who should be regarded as similarly situated. *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984); *L. TRIBE, supra* note 23, § 16-1, at 993. The United States Supreme Court has developed a two-tiered analysis to determine whether a classification violates the equal protection clause. If a classification impinges a fundamental right or is based on a suspect class, the court applies strict scrutiny. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.3 (1976) (giving examples of fundamental rights as including those of a uniquely private nature and the rights to vote, travel interstate, and procreate); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (defining suspect class as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"). Under the strict scrutiny test, the classification must be necessary to promote a compelling state interest. *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984). If strict scrutiny does not apply, the Court applies a rational relation test: The classification need only be rationally related to a legitimate government purpose. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (citing *Matthews v. DeCastro*, 429 U.S. 181 (1976); *Dandridge v. Williams*, 397 U.S. 471 (1970)).

The latter analysis, the rational basis test, applies to local hire law cases. In *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the Court held that no fundamental right to government employment exists. *Id.* at 313. *Cf. McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976) (per curiam) (rejecting equal protection challenge to municipal residency requirement for municipal workers); see also *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977). Nonresidents are not a suspect class. *Martinez v. Bynum*, 461 U.S. 321, 328 n.7 (1983). Because no fundamental right or suspect class is involved in the equal protection analysis of a local hire law, the law would be analyzed under the lenient rational basis test, which a state may easily meet. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *L. TRIBE, supra* note 23, § 16-2, at 996 (noting that some courts have equated the rational basis test with a "strong presumption of constitutionality").

The commerce clause also provides no remedy to those who suffer discrimination under resident preference laws. In *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983), the Court flatly rejected a commerce clause challenge to a local hire law promulgated through an executive order by the mayor of Boston. Because the Court resolved the case under the commerce clause, it did not address whether the local hire law violated the privileges and immunities clause. *Id.* at 214-15 n.12. Although the local hire law at issue discriminated against nonresidents, the city, in hiring for its own construction projects, was a "market participant," not a "market regulator." *Id.* at 214-15. The Court first articulated this distinction in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), stating: "Nothing in the purposes animating the Commerce Clause prohibits a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810 (footnotes omitted). As a market participant, the city could discriminate without violating the commerce clause. The city enjoyed "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.* at 438-39 (quoting *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919)). The Court

In the cases considered thus far, the Court has provided a relatively straightforward framework for privileges and immunities analysis of local hire laws. Before presenting that framework, this note discusses the origins and purposes of the privileges and immunities clause.

A. Privileges and Immunities Analysis: Background and Framework

The privileges and immunities clause originated in the fourth article of the Articles of Confederation.²⁵ The present clause was "formed exactly upon the principles" enunciated by the Articles Congress.²⁶ The drafters intended to combat protectionist economic policies emerging among the states after the American Revolution²⁷ and to "fuse into one Nation a collection of independent, sovereign states."²⁸ The privileges and immunities clause thus provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States."²⁹

In recognition of the drafters' intent, the United States Supreme Court has limited the scope of the clause to those privileges and immunities "bearing upon the vitality of the Nation as a single entity,"³⁰ calling these "fundamental rights."³¹ Because the clause was designed to create a "national economic union,"³² the Court considers employment a fundamental right for the purposes of privileges and immunities analysis. As early as 1871, the Court recognized "the right of a citizen of one State to pass into any other State of the Union for the

affirmed this view in *United Building & Construction Trades Council v. Mayor of Camden*, holding that Camden's local hire law did not violate the commerce clause. 465 U.S. at 204, 220 (1984).

25. ARTICLES OF CONFEDERATION, art. IV.

26. 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 112 (1911), quoted in *New Hampshire v. Piper*, 470 U.S. 274, 279-80 n.7 (1985).

27. *Salla v. County of Monroe*, 48 N.Y.2d 514, 520-21, 399 N.E.2d 909, 912, 423 N.Y.S.2d 878, 880-81 (1979).

28. *New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)).

29. U.S. CONST. art. IV, § 2, cl. 1. Two points of terminology are noteworthy. First, under privileges and immunities analysis, the terms "citizen" and "resident" are "essentially interchangeable." *Hicklin v. Orbeck*, 437 U.S. 518, 524 n.8 (1978) (citations omitted). Second, the term "citizen," as used in the privileges and immunities clause, includes neither corporations nor aliens. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

30. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).

31. *Id.* at 384 n.20. Note that fundamental rights in the privileges and immunities context are not equivalent to fundamental rights under equal protection analysis: Only those rights fundamental to national unity will trigger privileges and immunities protection. L. TRIBE, *supra* note 23, at 35 (Supp. 1979).

32. *Piper*, 470 U.S. at 279-80.

purpose of engaging in lawful commerce, trade, or business without molestation"³³ Thus, one seeking employment outside his home state may claim the protection of the privileges and immunities clause. In *United Building & Construction Trades Council v. Mayor of Camden*, even more pertinently, the Court held that private employment on public works projects is a fundamental right.³⁴

Even when a fundamental right is involved, however, the privileges and immunities clause does not afford a nonresident worker absolute protection. In *Toomer v. Witsell*,³⁵ the United States Supreme Court held that the Constitution prohibits only certain types of discrimination against nonresidents. The Court in *Toomer* articulated a fairly rigid test under which a state could constitutionally justify discriminating against nonresidents. First, the state must prove that a "substantial reason" exists for the discrimination.³⁶ To fulfill this requirement, the state must show that nonresidents constitute "a peculiar source of the evil" that the discrimination is designed to combat.³⁷ Second, the state must narrowly tailor a statute so that in the opinion of the Court a "reasonable relationship" exists "between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them."³⁸

In summary, the United States Supreme Court's framework requires that a fundamental right, such as employment, be involved before a litigant can invoke the protection afforded by the privileges and immunities clause. Even when a fundamental right is involved, however, the state can defeat the claim by sustaining the burden of showing that it has a substantial justification for its discrimination against nonresidents and that the law in question is narrowly tailored to combat the problem for which it was created.

B. *Hicklin* and *Camden*

The United States Supreme Court has considered privileges and immunities clause challenges to local hire laws in *Hicklin v. Orbeck*³⁹ and *United Building & Construction Trades Council v. Mayor of Camden*.⁴⁰ In *Hicklin*, the resident preference law in question required that "all oil and gas leases, easements or right of way permits for oil and gas pipeline purposes, unitization agreements or any renegotiation

33. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871).

34. 465 U.S. 208, 221 (1984).

35. 334 U.S. 385 (1948).

36. *Id.* at 396.

37. *Id.* at 398.

38. *Id.* at 399.

39. 437 U.S. 518 (1978).

40. 465 U.S. 208 (1984).

of any of the preceding to which the state is a party" contain a provision "requiring the employment of qualified Alaska residents" as preferred to nonresidents.⁴¹ Eight nonresidents⁴² who sought employment in Alaska challenged the act under both the privileges and immunities clause and the equal protection clause.⁴³

The Alaska Supreme Court, though striking the law's durational residency requirement,⁴⁴ upheld as constitutional the distinction between residents and nonresidents.⁴⁵ With little elaboration, the court ruled that the local hire law satisfied state and federal equal protection clauses.⁴⁶ Relying on an old line of cases holding that a state can prefer its own residents when distributing its natural resources, the court also concluded that the Alaska Hire law did not fall within the purview of the privileges and immunities clause.⁴⁷

The United States Supreme Court reversed the Alaska Supreme Court and struck down the Alaska statute in its entirety as violative of the privileges and immunities clause.⁴⁸ The Supreme Court noted that employment constitutes a fundamental right and therefore deserves protection under the privileges and immunities clause.⁴⁹ Even if the state's justification for Alaska Hire were valid, an assumption characterized as "dubious," the Court opined that the statute could not pass

41. ALASKA STAT. § 38.40.030 (repealed 1980). This statute provided:

In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents

Id.

42. The preference originally included a one-year durational residency requirement, but that portion of the act was stricken as a violation of the equal protection clause by the Alaska Supreme Court in *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977).

43. Because the United States Supreme Court found the statute to violate the privileges and immunities clause, it did not consider the equal protection clause challenge. *Hicklin*, 437 U.S. at 534.

44. *See supra* note 42.

45. *Hicklin*, 565 P.2d at 167, 169.

46. *Id.* at 167.

47. *Id.* at 169. This line of cases begins with *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823), in which a court upheld a law limiting commercial shellfishing to local fishermen. The court held that the fishery was the common property of the residents of New Jersey and could be restricted for their use. *Id.* *See also* *Geer v. Connecticut*, 161 U.S. 513 (1896); *McCready v. Virginia*, 94 U.S. 391 (1877).

48. *Hicklin*, 437 U.S. at 534.

49. *Id.* at 525.

either part of the *Toomer* test.⁵⁰ First, the state failed to present a substantial justification for its discrimination. Alaska had not shown that nonresidents were a "peculiar source" of the state's high unemployment. In fact, many Alaska residents were jobless because they were not qualified for available employment.⁵¹ Second, the state had failed to prove that the act was sufficiently narrow in scope.⁵² The act, which granted an across-the-board preference for all jobs and all residents, regardless of training or employment status, was grossly overinclusive.⁵³

The Court also refuted the state's claim of immunity from the strictures of the privileges and immunities clause based on the natural resources exception.⁵⁴ The Court noted that a state's proprietary connection to the discrimination may warrant consideration, but held that Alaska's attenuated proprietary interest in the contracts regulated by Alaska Hire could not justify the resulting discrimination.⁵⁵ According to the Court, the Act "[was] an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the state's residents."⁵⁶

The Court next applied privileges and immunities analysis to a local hire law in *United Building & Construction Trades Council v. Mayor of Camden*.⁵⁷ *Camden* involved a municipal law that required forty percent of all employees of contractors and subcontractors on city projects to be Camden residents.⁵⁸ The proposed justification presented by the city was that the law was enacted to alleviate economic blight and to halt the resulting exodus of Camden's residents.⁵⁹

Although the case applies a privileges and immunities analysis to a municipal law,⁶⁰ the Court's opinion is applicable to state laws in

50. *Id.* at 526-27 (footnote omitted).

51. *Id.*

52. *Id.* at 527-28.

53. *Id.*

54. *Id.* at 528.

55. *Id.* at 529.

56. *Id.* The Court noted that the only limit on the scope of Alaska Hire was that the activity to which the statute was applied take place within Alaska. *Id.* at 531.

57. 465 U.S. 208 (1984).

58. The Camden ordinance, adopted as part of a statewide affirmative action program, required that contractors on public works projects attempt to employ Camden residents and always have Camden residents comprising at least 40% of workers. *Id.* at 211.

59. *Id.* at 222.

60. *Id.* at 216-18. The Court held that the Camden ordinance was not exempt from privileges and immunities clause review at the challenge of out-of-state residents merely because some in-state residents were similarly affected by the ordinance. *Id.* at 217-18.

several respects. The Court held the right to employment with private contractors on public works projects to be fundamental.⁶¹ The Court also outlined the appropriate framework for evaluating the constitutionality of the statute, the *Toomer* test refined in *Hicklin* ("the *Toomer-Hicklin* test").⁶² However, due to a sparsity of evidence, the Court declined to apply the test.⁶³ Instead, the Court remanded the case for evaluation under the articulated standards.⁶⁴

Camden shows that the Court is retreating from the hard line it took against local hire laws in *Hicklin*. The Court made several notable points that could work in favor of a state attempting to defend a local hire law. First, the Court held that any analysis under the privileges and immunities clause must "be conducted with due regard for the principle that states should have considerable leeway in analyzing local evils and in prescribing appropriate cures."⁶⁵ Second, noting Camden's proprietary interest in the jobs at issue, the Court stated that granting leeway was especially important when a government practiced discrimination as a condition of its own spending.⁶⁶ The Court distinguished its rejection of the proprietary interest asserted in *Hicklin*,⁶⁷ which it had held to be too attenuated to justify Alaska's discrimination. The Camden ordinance, by contrast, did not have the "ripple effect" that proved fatal to the Alaska law.⁶⁸ "It [the Camden ordinance] is limited in scope to employees working directly on city public works projects," the Court noted.⁶⁹ As the preceding discussion shows, the *Camden* Court apparently recognized the importance of the mitigating factors it had rejected under the *Hicklin* facts. Unfortunately, due to the lack of evidence before the Court, it could not apply these factors to the local hire law in controversy.⁷⁰

61. *Id.* at 219.

62. *See supra* notes 50-53 and accompanying text.

63. *Camden*, 465 U.S. at 223. No trial had been held in the case. The Supreme Court of New Jersey had certified the case for direct appeal after brief administrative proceedings pertaining to the state treasurer's approval of the law. *Id.*

64. *Id.*

65. *Id.* at 222-23 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

66. *Id.* at 223.

67. *See supra* notes 59-60 and accompanying text.

68. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 223 (1984).

69. *Id.*

70. One group of commentators interprets the *Camden* ruling as clearly favorable to states attempting to uphold local hire laws. *See* 1 R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 23, § 12-7, at 658. The authors state that *Camden*'s reference to other cases upholding restrictions on public employment against equal protection and commerce clause claims indicates that the Court is unlikely to invalidate city or state residency requirements for public employment under the privileges and immunities clause. *Id.*

III. STATE COURT INTERPRETATIONS OF LOCAL HIRE LAWS

A. *State v. Antonich*: Wyoming Preference Act Upheld

Wyoming is the only state in which a highest state court has held a local hire law constitutional in the wake of *Camden*. The case that tested the Wyoming law, *State v. Antonich*,⁷¹ stemmed from the criminal prosecution of construction company superintendent Roger Antonich.⁷² The state charged Antonich with violating the Wyoming Preference Act,⁷³ which gives a complete preference to qualified Wyoming residents for employment on public works projects and provides misdemeanor penalties for supervisors who flout the law.⁷⁴ The prosecutor alleged that Antonich fired a Wyoming worker from a public construction project in order to hire nonresident workers.⁷⁵ The county court dismissed the charge on the ground that the statute violated the privileges and immunities clause. The Wyoming Supreme Court reversed and found that the statute satisfied the *Toomer-Hicklin* test.⁷⁶

As a threshold matter, the state conceded that the Wyoming Preference Act burdened a fundamental right, the right of a nonresident to work on a public construction project,⁷⁷ and therefore fell within the purview of the privileges and immunities clause. The evil that the Act was intended to combat was "... a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project."⁷⁸ The court found that "without question" reduction in unemployment is a valid state goal.⁷⁹ Conceding that other states' local hire laws have usually not survived privileges and immunities scrutiny, the court explained several factors distinguishing the Wyoming statute

71. 694 P.2d 60 (Wyo. 1985).

72. *Id.* at 61.

73. WYO. STAT. §§ 16-6-201 to -206 (1977). The Act provides:

Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision . . . shall employ only Wyoming laborers on the project or improvement. Every contract let by any person shall contain a provision requiring that Wyoming labor be used except other laborers may be used when Wyoming laborers are not available for the employment from within the state or are not qualified to perform the work involved.

Id. § 16-6-203 (1977).

74. *Id.* § 16-6-206 (1977).

75. *Antonich*, 694 P.2d at 61.

76. *Id.* at 64.

77. *Id.* at 62.

78. *Id.* (citation omitted).

79. *Id.*

and contrasted the Wyoming law with the Alaska Hire statute stricken in *Hicklin*.⁸⁰

The court described several features that narrow the scope of the Wyoming Preference Act. First, the Act does not attempt to eliminate general unemployment. Instead, it applies only to nonresident applicants for public works construction jobs.⁸¹ Second, the statute limits demands on employers, merely requiring an employer to deny nonresidents employment when the state can provide qualified residents to meet its needs.⁸² Finally, the statute applies only to projects in which the state has a proprietary interest.⁸³ The court concluded that the Act was constitutional because it narrowly addressed the goal of reducing unemployment and because the degree of discrimination "bears a close relation to the state's valid reasons for discriminatory treatment."⁸⁴

Gaps exist in the *Antonich* court's reasoning. The *Toomer-Hicklin* test requires (1) that nonresidents constitute a peculiar source of the evil at which the statute is aimed, and (2) that the discrimination be no greater than necessary. The *Antonich* court's opinion, however, lacks analysis of either of these issues.

Nonresidents may in fact cause unemployment in Wyoming. In 1985, the state ranked fourth highest in percentage of unemployment benefits paid interstate.⁸⁵ This factor may indicate a high percentage of nonresidents working in Wyoming.⁸⁶ The combination of these factors indicates that Wyoming has an unemployment problem that may be caused by nonresidents. The court should have considered such factors in its opinion rather than assuming that a causal relationship existed between nonresident laborers and unemployment.⁸⁷

80. *Id.* at 64. The court stated:

The Wyoming statute at issue in the present case requires merely that governmental funds, allocated to public works projects, be used to hire qualified, available residents in preference to nonresidents. The statute does not effect the sort of wide-ranging discriminatory treatment fatal to Alaska Hire in *Hicklin v. Orbeck*.

Id. at 63.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 64.

85. LABOR REPORT, *supra* note 3, at 19.

86. *See supra* note 5.

87. *State v. Antonich*, 694 P.2d 60, 64 (Wyo. 1985) (Thomas, C.J., concurring). Chief Justice Thomas stated:

I have a concern about the adequacy of the record to support the nexus between the evil of "a qualified Wyoming worker's remaining unemployed

The concurrence in *Antonich* points out a second flaw in the majority's analysis. Although the majority finds that the statute's narrowing features allowed it to pass the second prong of the *Toomer-Hicklin* test, the concurrence disagreed with this holding.⁸⁸ The concurrence notes that the preference granted by the statute is not limited to those who are unemployed. Any Wyoming resident who is qualified and available for work receives a preference.⁸⁹ A statute granting employed residents a preference to the detriment of nonresidents is overbroad for its stated purposes of reducing unemployment.

In sum, *Antonich* demonstrates that a local hire statute can pass judicial scrutiny. However, the court apparently applied the *Toomer-Hicklin* test perfunctorily. Although it is possible that the Wyoming statute could have passed constitutional muster, the *Antonich* opinion does not prove that the statute *should* have survived.

B. Cases Striking Local Hire Laws

State and federal courts outside Alaska have held local hire laws unconstitutional as violative of the privileges and immunities clause. Perhaps the most restrictive interpretation of the constitutionality of a local hire law derives from a 1984 advisory opinion of the Supreme Judicial Court of Massachusetts to the Massachusetts Senate.⁹⁰ The Massachusetts court analyzed a proposed bill that would require private contractors on state-funded projects in areas with high unemployment to employ Massachusetts residents in at least eighty percent of all jobs covered by the contract.⁹¹

In its analysis of the bill, the Supreme Judicial Court of Massachusetts observed initially that the bill would burden a fundamental right.⁹² The court then found that the bill failed both prongs of the *Toomer-Hicklin* test. Noting that it had no records with which to work, the court assumed *arguendo* that nonresidents were a peculiar

while a nonresident goes to work on a government-funded construction project" and the statute in question. I agree that that is a possibility, but the record does not demonstrate it.

Id.

88. *Id.*

89. *Id.* Unfortunately, the concurring opinion provides merely an unworkable alternative. The concurrence relies upon the state's proprietary interest in the projects to find that the statute does not violate the privileges and immunities clause. The concurrence seems to stipulate that because the state is participating in the marketplace its actions are immune from privileges and immunities clause scrutiny. *Id.* at 65. The United States Supreme Court, however, has rejected that argument. *See supra* note 24.

90. Opinion of the Justices to the Senate, 393 Mass. 1201, 469 N.E.2d 821 (1984).

91. *Id.* at 1201-02, 469 N.E.2d at 822.

92. *Id.* at 1203, 469 N.E.2d at 823.

source of unemployment in Massachusetts. The court added, however, that such a finding "may be merely conclusory."⁹³ The bill also failed the second prong of the *Toomer-Hicklin* test because the court found that the degree of discrimination did not bear a close relationship to the goal sought to be achieved by the bill.⁹⁴ The bill provided no proof that an eighty percent preference was related empirically to the evil of nonresident interference.⁹⁵ Any employed or unemployed Massachusetts resident with any level of training or experience received a preference.⁹⁶ The bill also did not limit the preference to residents of critical areas.⁹⁷ Thus, even if nonresidents were found to be a peculiar source of unemployment in Massachusetts, in the opinion of the Supreme Judicial Court of Massachusetts, the bill would not pass constitutional muster.⁹⁸

W.C.M. Window Co. v. Bernardi,⁹⁹ a case analyzing an Illinois preference statute, provides an enlightening examination of the constitutional issues involved in the local hire debate. The statute was a typical one, providing a complete preference to Illinois residents as laborers on public works projects.¹⁰⁰ The United States Court of Appeals for the Seventh Circuit, in an opinion by Judge Posner, held that although unemployment may be a valid ground for discrimination,¹⁰¹ the state must show some nexus between the statute and the problem it

93. *Id.* at 1205 n.5, 469 N.E.2d at 824 n.5. The court noted:

It is possible that the unemployment rate in an area may vastly exceed the percentage of positions held by nonresidents, and that the types of positions held by nonresidents may be different in nature from those for which Massachusetts residents are both available and appropriately trained. It is also possible that employment of nonresidents might be the result of such factors as too few trained applicants in the local labor force rather than the cause of unemployment in the local area, so that the level of local unemployment may not be directly related to the employment of nonresidents. In short, a conclusory finding might not show that nonresidents are a "peculiar source of the evil."

Id.

94. *Id.* at 1206, 469 N.E.2d at 824.

95. *Id.*

96. *Id.*

97. *Id.*

98. The court also held that Massachusetts' proprietary interest in the projects was insufficient to justify its discrimination. *Id.* at 1207, 469 N.E.2d at 825-26. The court noted that in projects funded only partially by Massachusetts, the state's proprietary interest would be less. *Id.*

99. 730 F.2d 486 (7th Cir. 1984). One month after the *W.C.M. Window Co.* decision, the Illinois Supreme Court struck down the state's local hire statute on privileges and immunities grounds in *People v. Leary Construction Co.*, 102 Ill. 2d 295, 464 N.E.2d 1019 (1984).

100. ILL. REV. STAT. ch. 48, paras. 269-275 (1986).

101. *W.C.M. Window Co.*, 730 F.2d at 497. "[T]he intimation in *Hicklin* . . . that unemployment may never be a valid ground for discriminating against nonresidents can no longer be considered authoritative. The Court in *United Bldg. & Construction*

seeks to remedy.¹⁰² Illinois had presented no evidence of the benefits of the preference law, a fatal flaw in the view of Judge Posner. He wrote:

The preference law might have no effect on the unemployment rate in Illinois. Worse, it could boomerang, and actually increase unemployment in the construction industry. Suppose for example that a public construction project would cost \$1 million if it employed both Illinois residents and nonresidents and \$1.2 million if it employed only Illinois residents. If the higher price were more than [the government] was willing to pay, the project would not be authorized and the Illinois residents who would have worked on it would have to seek work elsewhere.¹⁰³

Thus, Judge Posner's analysis reveals the possible ramifications of discrimination against nonresidents through employment preferences. The court concluded that the state fell short in its attempt to prove that nonresidents were a peculiar source of unemployment, and the statute, therefore, was an unconstitutional infringement on the rights of nonresidents.¹⁰⁴

Three other often-cited cases also hold local hire laws unconstitutional. These cases are *Neshaminy Constructors v. Krause*,¹⁰⁵ *Salla v. County of Monroe*,¹⁰⁶ and *Laborers Local Union No. 374 v. Felton Construction Co.*¹⁰⁷ Although these state cases predate *Camden*, they nonetheless provide useful insights.¹⁰⁸ Initially, the *Salla* and *Felton* courts ruled that employment is a fundamental right, thus triggering privileges and immunities analysis.¹⁰⁹ The *Felton* court found that the state had not proven that nonresidents constituted a peculiar source of unemployment.¹¹⁰ The court reasoned that without evidence that an

[*Trades Council v. Mayor of Camden*] not only allowed the City of Camden to attempt to justify the discrimination but quoted from *Toomer* the statement that 'the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.' " *Id.* (citations omitted).

102. *W.C.M. Window Co.*, 730 F.2d at 497.

103. *Id.* at 498.

104. *Id.*

105. 181 N.J. Super. 376, 437 A.2d 733 (1981).

106. 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979).

107. 98 Wash. 2d 121, 654 P.2d 67 (1982).

108. In the interest of brevity, the local hire statutes involved are not presented here. Each, however, is typical of local hire laws explored thus far, providing a sweeping employment preference for all state residents on public construction projects for all or a large percentage of all jobs.

109. *Felton*, 98 Wash. 2d at 126, 654 P.2d at 70; *Salla*, 48 N.Y.2d at 522-23, 399 N.E.2d at 913, 423 N.Y.S.2d at 882. The *Krause* court seems to overlook this requirement. *Krause*, 181 N.J. Super. 376, 437 A.2d 733.

110. *Felton*, 98 Wash. 2d at 129, 654 P.2d at 70. The court noted that the state had not:

provide[d] any evidence regarding the extent to which wages would be diverted out of state. . . . [S]ome secondary economic activity is generated

"evil" existed, it could not analyze whether the statute was closely related to eliminating that evil.¹¹¹ Finally, the court considered the state's proprietary interest and held that the interest was too insubstantial to save the statute.¹¹²

The *Salla*¹¹³ court followed similar reasoning. Again, the state had not proven that nonresidents constituted a peculiar source of unemployment,¹¹⁴ nor was the statute closely tailored to achieve the state's goal of reducing unemployment.¹¹⁵ The law, "with blunderbuss overbreadth,"¹¹⁶ granted a blanket employment preference to residents without distinguishing among various levels of competence.¹¹⁷ The court also believed the law to be inefficient because employers lost control over hiring decisions.¹¹⁸ Once again, the state's asserted proprietary interest was inadequate to rectify the discrimination caused by the statute.¹¹⁹

In *Krause*,¹²⁰ the Superior Court of New Jersey found that state's statute was marred by the "same infirmities" stricken by the New York court in *Salla*.¹²¹ The court concluded that a state law that allowed the hiring of nonresidents for work on state construction only when residents were unavailable violated the privileges and immunities clause under the *Toomer-Hicklin* analysis.¹²² Additionally, the *Krause* court found the state's proprietary interest in the project at bar too attenuated to justify the state's discrimination.¹²³

only by having out-of-state workers with their additional requirements of food and shelter. Finally, even if we were to assume some wages would be diverted out of state, we have been provided no information by which to compare . . . that "loss" . . . with the advantage of lower bids on public works by out-of-state contractors.

Id. at 128, 654 P.2d at 70.

111. *Id.* at 129, 654 P.2d at 71.

112. *Id.* at 129-32, 654 P.2d at 71-72. The federal government had financed 75% of the project from which the case arose. *Id.* at 130, 654 P.2d at 71.

113. 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979).

114. *Id.* at 523, 399 N.E.2d at 914, 423 N.Y.S.2d at 882.

115. *Id.*

116. *Id.*

117. *Id.* at 523-24, 399 N.E.2d at 914, 423 N.Y.S.2d at 882-83.

118. *Id.* at 524, 399 N.E.2d at 914, 423 N.Y.S.2d at 883.

119. *Id.* at 525, 399 N.E.2d at 914, 423 N.Y.S. 2d at 883. The project was financed largely by the federal government.

120. 181 N.J. Super. 376, 437 A.2d 733 (1981).

121. *Id.* at 382-83, 437 A.2d at 737 (citation omitted).

122. *Id.* at 381, 437 A.2d at 736.

123. *Id.* at 383, 437 A.2d at 737. The project leading to the *Krause* case was 80% federally funded. *Id.*

IV. ALASKA

A. *Robison v. Francis*

In its most recent local hire law case, *Robison v. Francis*,¹²⁴ the Alaska Supreme Court struck down a law that required work on public construction projects to be performed almost entirely by Alaska residents.¹²⁵ The case arose from the firing of a Montana resident, James Francis, from an Alaska public works construction project.¹²⁶ Francis worked in 1983 as an ironworker for Regan Steel & Supply, a subcontractor on a high school project.¹²⁷ After the Alaska Department of Labor learned that Regan Steel Supply had employed more than five percent nonresidents, it notified the company of the violation of the statute, thereby causing Francis to be discharged.¹²⁸ Francis sued the state and several state officials, attempting to obtain a declaration that the local hire law was unconstitutional under the privileges and immunities clause of article IV, the equal protection and privileges and immunities clauses of the fourteenth amendment to the federal Constitution, and the equal protection clause of the Alaska Constitution.¹²⁹ After a bench trial, the Superior Court in the Third Judicial District declared the statute to be violative of the United States Constitution's article IV privileges and immunities clause.¹³⁰

The superior court applied the *Toomer-Hicklin* test, and held that the right to obtain employment was fundamental and that the state

124. 713 P.2d 259 (Alaska 1986).

125. ALASKA STAT. § 36.10.010 (repealed 1986) provided in part:

(a) In the performance of contracts let by a municipality for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work or any other retention of services necessary to complete any given project, 95 percent residents shall be employed where they are available and qualified. If 10 or fewer persons are employed under the contract, then 90 percent residents shall be employed where they are available and qualified. In all cases of public works projects, preferences shall be given to residents. . . .

(b) When a construction project is partly or wholly funded by state money and the state or an agency of the state, a department, office, agency, state board, commission, regional school board . . . is a signatory to the construction contract, the contract shall require that the worker hours on a craft-by-craft basis shall be performed at least 95 percent by bona fide state residents. If 10 or fewer persons are employed under the contract, then 90 percent residents shall be employed where they are available and qualified.

Id.

126. *Francis*, 713 P.2d at 261.

127. *Id.*

128. *Id.*

129. *Id.* Francis also sought injunctive relief and damages under 42 U.S.C. § 1983 (1982). *Francis*, 713 P.2d at 261.

130. *Francis*, 713 P.2d at 261

had failed to justify the burden it had placed on this right.¹³¹ The court found insufficient the evidence that nonresidents were a peculiar source of unemployment in Alaska's construction industry.¹³² In this regard, the court noted Alaska's population and economic growth, and concluded that the major factor affecting construction employment in Alaska was the state's extreme weather conditions.¹³³ Although immigration is a factor affecting unemployment, the court conceded, most job-seekers coming to Alaska intend to reside there.¹³⁴ Therefore, the state failed to meet either prong of the *Toomer-Hicklin* test because it proved neither that nonresidents were a peculiar source of unemployment in Alaska nor that the resident preference act was a narrowly tailored means to address the problem.¹³⁵

The Alaska Supreme Court affirmed the lower court's holding.¹³⁶ As a preliminary matter, the court concluded that Francis' claim fell within the scope of the privileges and immunities clause, stating that employment within the construction industry is a fundamental right.¹³⁷ The court then rigorously applied the *Toomer-Hicklin* test to the facts of the case. To satisfy the first prong of the *Toomer-Hicklin* test, the state must show substantial justification for the discrimination. In *Francis*, the State of Alaska contended that the local hire law decreased state unemployment rates by eliminating nonresidents from public works construction projects. The court, applying intermediate scrutiny, found this justification insubstantial.¹³⁸ The court admitted that Alaska did in fact suffer from high unemployment. However, the state did not show at trial that nonresidents were a peculiar source of unemployment in Alaska.¹³⁹ Additionally, the state's purported justification was insufficient as a matter of law. According to the court,

131. *Id.* at 262.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 261.

136. *Id.* at 271.

137. *Id.* at 265.

138. *Id.* at 266. The court applied intermediate scrutiny even though the statute was limited to situations in which the state was acting as a market participant. This level of scrutiny is contrary to the Supreme Court's holding in *United Building & Construction Trades Council v. Mayor of Camden* that a court should grant a state more leeway when the state is setting conditions on funds in its control. 465 U.S. 208, 223 (1984). See *supra* note 68. The *Francis* court held that the leeway allowed by *Camden* was negated in this case by the "pervasiveness and intensity" of the discrimination wrought by the statute. *Francis*, 713 P.2d at 265. Public works projects constitute 60% to 70% of all construction within the state, and because of the act, nonresidents were almost completely excluded from the projects. *Id.*

139. *Francis*, 713 P.2d at 266.

benefitting residents economically at the expense of nonresidents is an improper and unconstitutional purpose.¹⁴⁰

The resident preference also failed the second prong of the *Toomer-Hicklin* test, which requires that the statute be sufficiently narrow in scope. The statute at issue, like that stricken in *Hicklin*, gave "preferential treatment to residents who d[id] not need it and therefore was overly broad."¹⁴¹ For instance, a resident need not have been unemployed to obtain a preference under the statute. Any available and qualified Alaskan could receive a preference even if he were already employed in the private sector and wanted merely to switch to a public sector job.¹⁴² Moreover, although an employer could apply for a waiver of the statute, an individual worker had no remedy.¹⁴³ The statute also did not reflect the disparity of unemployment rates in different areas of Alaska, thus providing employment preferences in areas where jobs were plentiful.¹⁴⁴ Finally, the statute superseded any collective bargaining agreements, which generally called for a fifty to sixty percent resident preference.¹⁴⁵ In summary, the statute was insufficiently narrow in scope, thus failing the second prong of the *Toomer-Hicklin* test and, as previously stated, the statute failed the first prong of the test because the state had failed to show a substantial reason for its discrimination.¹⁴⁶

140. *Id.* The court quoted a footnote in *New Hampshire v. Piper*, 470 U.S. 274, 285 n.18 (1985). A reason suggested for New Hampshire's law prohibiting nonresident lawyers from joining the bar was the protection of New Hampshire lawyers. The Court stated: "This reason is not 'substantial.' The privileges and immunities clause was designed primarily to prevent such economic protectionism." *Id.*

141. *Francis*, 713 P.2d at 268.

142. Brief for Appellee at 34, *Robison v. Francis*, 713 P.2d 259 (Alaska 1986) (No. S-493).

143. *Id.* at 35.

144. *Id.* at 37.

145. *Id.* The *Francis* challengers argued that because unions would be the strongest supporters of a resident preference act, any legislation exceeding union demands is excessively broad. *Id.* at 38.

146. As a tangential matter, the court noted important distinctions between the facts of *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984), and *Francis*. The *Francis* court contrasted Alaska's "dynamic and growing economy" with the depressed economy of Camden. 713 P.2d at 269. The court stated:

The fact that the [Camden] program was not rejected in the face of grave economic and social ills may mean that local or state governments may foster discrimination in order to stave off an economic or social collapse, a goal broader than, but related to, that of benefitting local residents economically.

Id. at 267 n.8.

The Alaska statute also effected greater discrimination than Camden's ordinance. *Id.* at 269. The court noted that public works projects constitute the majority of commercial construction in Alaska. Conceding that the *Camden* opinion does not contain similar data, the *Francis* court then compared the 90% preference of Alaska's law to

Perhaps the most interesting facet of *Francis* is Justice Burke's concurrence. Justice Burke agreed that the statute violated the privileges and immunities clause,¹⁴⁷ but contended that the statute should have been invalidated under the Alaska Constitution's equal protection clause.¹⁴⁸ In his opinion, however, Justice Burke presented no substantive analysis under the equal protection clause. He simply noted that, as a procedural matter, a state court considering challenges under federal and state constitutions should first consider state requirements.¹⁴⁹ Justice Burke also noted that a holding under the Alaska Constitution would not be reviewed by the United States Supreme Court and thus would be final.¹⁵⁰

B. The New Local Hire Law

After the Alaska Supreme Court decided *Francis*, the Alaska Legislature created employment preferences for certain residents of statutorily defined "zones of underemployment" and "economically distressed zones."¹⁵¹ The preferences, still untested in the courts, provide as follows:

Sec. 36.10.150. Determination of zone of underemployment.

(a) Immediately following a determination by the commissioner of labor that a zone of underemployment exists, and for the next two fiscal years after the determination, qualified residents of the zone who are eligible under AS [Alaska Statutes] 36.10.140 shall be given preference in hiring for work on

Camden's 40% preference. *Id.* The focus of the *Camden* case also was different. The main issue in *Camden* was whether the privileges and immunities clause applied to a municipal law that discriminated against both in-state and out-of-state residents. Because the *Camden* court never decided whether the city's law violated the privileges and immunities clause, the case "did not shed much new light" for the *Francis* court. *Id.* The *Francis* court also quickly rejected *State v. Antonich*, 694 P.2d 60 (Wyo. 1985), as persuasive because *Antonich* relied heavily on *Camden*. *Francis*, 713 P.2d at 269.

147. The majority noted that its decision, based on the privileges and immunities clause, precluded analysis under the federal constitution's fourteenth amendment or the Alaska Constitution. *Francis*, 713 P.2d at 271.

148. Article I, section 1 of the Alaska Constitution provides in part: "[a]ll persons are equal and entitled to equal rights, opportunities and protection under the law."

149. *Francis*, 713 P.2d at 271 (Burke, J., concurring) (citation omitted). The state equal protection analysis suggested by Justice Burke is discussed *infra* in section (IV)(B)(2) of this note.

150. *Francis*, 713 P.2d at 272 (Burke, J., concurring). See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.2 (1981). For a discussion of the doctrine of independent and adequate state grounds, see Wise, *Northern Lights — Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1 (1986).

151. ALASKA STAT. §§ 36.10.070-.990 (1987). The amendments include employment preferences for economically disadvantaged minority and female residents. *Id.* §§ 36.10.170, .175. Analysis of these provisions, however, is beyond the scope of this note.

each project under AS [Alaska Statutes] 36.10.180 that is wholly or partially sited within the zone. The preference applies on a craft-by-craft or occupational basis.

(b) The commissioner of labor shall determine the amount of work that must be performed under this section by qualified residents who are eligible for an employment preference In making this determination, the commissioner shall consider the nature of the work, the classification of workers, availability of eligible residents, and the willingness of eligible residents to perform the work.

(c) The commissioner shall determine that a zone of underemployment exists if the commissioner finds that

- (1) the rate of unemployment within the zone is substantially higher than the national rate of unemployment;
- (2) a substantial number of residents in the zone have experience or training in occupations that would be employed on a public works project;
- (3) the lack of employment opportunities in the zone has substantially contributed to serious social or economic problems in the zone; and
- (4) employment of workers who are not residents is a peculiar source of unemployment of residents of the zone.¹⁵²

Sec. 36.10.160. Preference for residents of economically distressed zones.

(a) Immediately following a determination by the commissioner that an economically distressed zone exists, and for the next two fiscal years after the determination, qualified residents of the zone who are eligible under AS [Alaska Statutes] 36.10.140 shall be given preference in hiring for at least 50 percent of employment on each project under AS [Alaska Statutes] 36.10.180 that is wholly or partially sited within the zone. The preference applies on a craft-by-craft or occupational basis.

(b) The commissioner shall determine that an economically distressed zone exists if the commissioner finds that

- (1) the per capita income of residents of the zone is less than 90 percent of the per capita income of the United States as a whole, or the unemployment rate in the zone exceeds the national rate of unemployment by at least five percentage points;
- (2) the lack of employment opportunities in the zone has substantially contributed to serious social or economic problems in the zone; and

152. ALASKA STAT. § 36.10.150 (1987).

- (3) employment of workers who are not residents is a peculiar source of unemployment of residents of the zone.¹⁵³

These statutes are similar in that both preferences only apply to eligible residents within the zones. Under Alaska Statutes section 36.10.140, a zone resident is eligible for an employment preference if he is unemployed, underemployed, or the graduate of a job-training program.¹⁵⁴ Also, both statutes only apply to projects specified in section 36.10.180, generally those projects funded in whole or in part by Alaska.¹⁵⁵ Neither statute is triggered unless nonresidents are found to be a peculiar source of unemployment within the zone.¹⁵⁶

The statutes are substantially different in that section 36.10.150 gives the commissioner of labor considerable leeway to cope with the specific problems of underemployment, while section 36.10.160 presents far more specific triggers and remedies in economically distressed zones. For example, the commissioner must determine the amount of hiring preference necessary in a zone of underemployment, which exists when the rate of unemployment within the zone is "substantially higher" than the national rate.¹⁵⁷ By contrast, in an economically distressed zone, residents are granted a fifty percent employment preference when, among other factors, zone residents' per capita income is less than ninety percent of the national average or unemployment within the zone exceeds the national rate by at least five percent.¹⁵⁸

Each statute is specifically tailored to achieve its goal. While a statute granting wide leeway to fashion remedies in zones of underemployment allows the most specific solution possible for each zone, a

153. *Id.* § 36.10.160.

154. ALASKA STAT. § 36.10.140 provides:

Sec. 36.10.140. Eligibility for preference. (a) A person is eligible for an employment preference under this chapter if the person certifies eligibility as required by the Department of Labor, is a resident, and

- (1) is receiving unemployment benefits under AS [Alaska Stat.] 23.20 or would be eligible to receive benefits but has exhausted them;
- (2) is not working and has registered to find work with a public or private employment agency or a local hiring hall;
- (3) is underemployed or marginally employed as defined by the department; or
- (4) has completed a job-training program approved by the department and is either not employed or is engaged in employment that does not use the skills acquired in the job-training program.

155. *See id.* § 36.10.180.

156. *Id.* §§ 36.10.150(c)(4), .160(b)(3).

157. *Id.* § 36.10.150(c)(1).

158. *Id.* § 36.10.160(b)(1).

statute mandating when a preference is needed and enacting the minimum preference necessary allows for less chance of arbitrary or discriminatory enforcement.

If history repeats itself, Alaska's new employment preferences will face a court challenge in the future. Although one might attempt to base a challenge on several constitutional theories, only two viable grounds exist: the article IV privileges and immunities clause of the Constitution of the United States and the equal protection clause of the Alaska constitution.¹⁵⁹

1. *Privileges and Immunities Analysis.* The *Francis* majority articulated the framework to be used for privileges and immunities clause analysis: the *Toomer-Hicklin* test.¹⁶⁰ The new Alaska statutes regulate employment, a fundamental right protected by the privileges and immunities clause.¹⁶¹ Because the statutes discriminate against nonresidents of the zones in which they are enforced, Alaska must show substantial justification for the statutes' enactment.¹⁶² As the *Francis* court reasoned, the state must prove two points to show substantial justification. First, the state must show that nonresidents are a peculiar source of unemployment;¹⁶³ second, the state must offer a constitutionally acceptable purpose for the statute.¹⁶⁴

Because the statutes apply only when nonresidents constitute a peculiar source of unemployment,¹⁶⁵ it would seem that the statutes facially could meet the first requirement.¹⁶⁶ A statute, however, may also be unconstitutional as applied.¹⁶⁷ If the commissioner of labor enforces the statutes when nonresidents do not in fact constitute a peculiar source of unemployment in an area, that application would be unconstitutional.

Even if the state could show that nonresidents constituted a peculiar source of unemployment, the state would find it difficult to prove that its justification for the statute is legally permissible. In *Francis*, the court used a sliding scale analysis to determine the level of scrutiny

159. See *supra* notes 23-24 for a discussion of the United States Supreme Court's preclusion of other federal constitutional routes.

160. See *supra* notes 138-46.

161. See *supra* note 137. The statutes do not fall outside the scope of the privileges and immunities clause merely because they discriminate against Alaska residents as well as nonresidents. This conclusion may be drawn from a Supreme Court holding in *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984), discussed *supra* note 60.

162. See *supra* note 51 and accompanying text.

163. See *supra* note 139 and accompanying text.

164. See *supra* note 140 and accompanying text.

165. See *supra* note 156 and accompanying text.

166. Of course, a court must still make this factual finding.

167. R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 23, § 18.4, at 344.

to be used when analyzing a state's purported justification for nonresident discrimination.¹⁶⁸ While a court may scrutinize a law less strictly when a state is acting as a market participant,¹⁶⁹ the pervasiveness of the discrimination may negate the state's economic interest.¹⁷⁰ Although the 1986 statutes apply to the same jobs as the law invalidated in *Francis*,¹⁷¹ the discrimination wrought by the new statutes is less pervasive than that caused by Alaska's previous local hire statutes. Concededly, the construction industry is an important part of Alaska's economy, and public works projects constitute up to seventy percent of all construction jobs in Alaska.¹⁷² However, the old statute applied statewide¹⁷³ and to all residents. The new laws operate only when an area has been declared a zone of underemployment or an economically distressed zone.¹⁷⁴ Additionally, not all residents of such zones are entitled to such a preference.¹⁷⁵ The preferences themselves also are more limited: in both types of zones the preference applies on "a craft-by-craft or occupational basis."¹⁷⁶

The state has the same proprietary interest in the projects encompassed within both the old and the new statutes.¹⁷⁷ The *Francis* court stated that it did not give weight to the state's proprietary interest because of the wide discrimination caused by the law at issue.¹⁷⁸ The court therefore applied intermediate scrutiny. With respect to the new laws, the less pervasive discrimination involved might persuade a court to apply a lesser level of scrutiny should the statutes be challenged under the privileges and immunities clause. Even if intermediate scrutiny were applied, however, the law might pass muster.

To survive intermediate scrutiny, the state must have a substantial justification for its discrimination. In *Francis*, the majority struck down the state's justification, reducing unemployment caused by non-residents, as the sort of economic protectionism that the privileges and immunities clause was designed to prevent.¹⁷⁹ The rationale behind

168. *Robison v. Francis*, 713 P.2d 259, 264 (1986).

169. *Id.* at 265.

170. *Id.*

171. See *supra* notes 125, 155 and accompanying text.

172. *Francis*, 713 P.2d at 262.

173. ALASKA STAT. § 36.10.010 (repealed 1986).

174. *Id.* §§ 36.10.150, .160 (1987).

175. See *supra* note 154 and accompanying text.

176. ALASKA STAT. §§ 36.10.150(a), .160(a) (1987).

177. The employment preferences in both *Francis* and the new statutes apply when a project is funded "in whole or in part" by Alaska. ALASKA STAT. §§ 36.10.010 (1982), 36.10.180 (1987).

178. See *supra* note 138 and accompanying text.

179. See *supra* note 140 and accompanying text.

the new statutes is identical.¹⁸⁰ The *Camden* court implied that a state may foster such policies in certain situations,¹⁸¹ but the *Francis* court believed that exception inapplicable, contrasting Camden's bleak economy with Alaska's dynamic one.¹⁸² The court was correct in its assessment. The new amendments, however, directly address the situation the United States Supreme Court recognized in *Camden*: allowing economic protectionism in the face of disastrous economic conditions within a state. Alaska no longer has a booming economy.¹⁸³ The legislature recognized that, in some areas especially, unemployment is a critical problem. At least as to the first prong of the *Toomer-Hicklin* test, the statute may fit within the loophole left open in *Camden* by the Supreme Court.

The *Toomer-Hicklin* test, however, also requires that the statutes be narrowly tailored.¹⁸⁴ These statutes fail to meet this requirement. As previously noted, the statutes apply only in limited circumstances to certain individuals.¹⁸⁵ However, the statutes permit a complete preference to residents. The preference in economically distressed zones is a minimum of fifty percent of employment. The statute, however, sets no maximum level.¹⁸⁶ Furthermore, in zones of underemployment, the labor commissioner has complete discretion as to the amount of preference.¹⁸⁷

In sum, the statutes will not survive privileges and immunities scrutiny. Although the state may be able to prove that nonresidents constitute a peculiar source of unemployment, it is doubtful that the state could show a substantial justification for its discrimination in light of the *Francis* court's condemnation of economic protectionism.¹⁸⁸ The Supreme Court may have left open a loophole in *Camden*, but because the Court did not decide the case on the merits, this case is of little value.¹⁸⁹ Finally, even if the state could show a substantial legal justification for the statutes, the allowance of so wide a range of

180. The Alaska Senate Bill preceding the new statutes provided: "This act is intended to better fulfill the state's duty of loyalty to its citizens, reduce unemployment among residents of the state, remedy social harm resulting from chronic unemployment, and assist economically and socially disadvantaged residents." S. 367, 14th Leg., 2d Sess., 1986 Alaska Sess., Laws ch. 33, at 72.

181. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 222 (1984).

182. *Robison v. Francis*, 713 P.2d 259, 269 (Alaska 1986).

183. *See supra* notes 10-11.

184. *See supra* note 52 and accompanying text.

185. *See supra* notes 154-56 and accompanying text.

186. ALASKA STAT. § 36.10.160 (1987).

187. *Id.* § 36.10.150.

188. *See supra* note 140 and accompanying text.

189. *See supra* note 63 and accompanying text.

preferences prevents the statutes from being sufficiently narrowly tailored.

2. *Alaska's Equal Protection.* At the close of his concurring opinion in *Francis*, Justice Burke warned that even if a statute does survive scrutiny under the privileges and immunities clause, the law will not necessarily pass muster under the Alaska Constitution.¹⁹⁰ Indeed, Alaska's current equal protection analysis, which is distinct from federal equal protection analysis,¹⁹¹ is a flexible tool available to the court.¹⁹²

The Alaska Supreme Court has expressed dissatisfaction with the rigidity of the two-tiered federal equal protection test.¹⁹³ Consequently, the court has developed a sliding scale review of equal protection claims arising under the Alaska Constitution.¹⁹⁴ In *Alaska Pacific Assurance Company v. Brown*,¹⁹⁵ the court set out a three-part framework for equal protection analysis under the court's sliding scale. First, a court must determine the amount of weight that should be given to the constitutional interest impaired by the challenged law.¹⁹⁶ The more important the interest, the greater the state's burden in justifying the law. Second, a court must ascertain the purposes served by a challenged law. Based on the level of review found appropriate, a state may be required to show "only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest."¹⁹⁷ Third, a court must examine the fit between the means chosen by the state and the purposes of the law. The more important the weight given to the

190. See *supra* text accompanying notes 147-50.

191. See *supra* note 24.

192. For a discussion of the development of Alaska's independent equal protection analysis, see Wise, *supra* note 150. Although the United States Supreme Court's equal protection analysis does not afford a viable constitutional platform for a local hire law challenger, see *supra* note 24, Alaska's equal protection may. The Alaska Supreme Court is free to establish a *higher* level of equal protection than that established by the United States Supreme Court. See Wise, *supra* note 150, at 35. Indeed, through its sliding scale review, the Alaska Supreme Court may provide a more stringent review for those interests not considered important enough to warrant strict scrutiny under the federal system. See *infra* notes 204-06 and accompanying text.

193. *State v. Erickson*, 574 P.2d 1, 11 (Alaska 1978).

194. *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984) (citing *State v. Erickson*, 574 P.2d 1, 11 (Alaska 1978)).

195. 687 P.2d 264 (Alaska 1984). The *Brown* court summarized standards announced in *State v. Erickson*, 574 P.2d 1 (Alaska 1978) and revised in *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983).

196. *Brown*, 687 P.2d at 269.

197. *Id.*

interest in step one, the closer the fit the court will require.¹⁹⁸ Thus, the most important factor is the first step of the test, the importance of the interest infringed upon. This factor determines the state's burden in justifying the law in the second and third steps.¹⁹⁹

A challenger to a local hire law could frame his equal protection argument as follows: it is irrational for the state to distinguish between residents and nonresidents who are similarly situated regarding their right to employment.²⁰⁰ A court would begin its analysis of this claim by determining the importance of the claimant's right to employment on public works projects. Importantly, before the Alaska Supreme Court originally adopted its sliding scale approach, the court had stated in *Hicklin v. Orbeck* that the right to work was not fundamental for equal protection purposes.²⁰¹ In the same case, moreover, the court noted that nonresidents are not a suspect class.²⁰² The lack of either a suspect class or fundamental right suggests that the court would not assign the highest level of importance on the sliding scale to a local hire challenge. As previously stated, however, the Alaska Supreme Court does not utilize — and indeed frequently criticizes — the federal equal protection test's rigid two-tiered structure.²⁰³ That test would immediately apply a rational basis test absent a suspect class or a fundamental right.²⁰⁴ Arguably, the right to employment is one of substantial importance even if not considered fundamental.²⁰⁵ Thus, the Alaska court could develop a middle ground to analyze the importance of a nonresident's right to employment on public works projects. One commentator suggests just such an application of the Alaska sliding scale: "The real advantage of the Alaska sliding scale approach will be in the middle range of interests between those interests to which the federal doctrine has applied only a rational basis

198. *Id.* "At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer." *Id.* at 269-70.

199. *Id.* at 271.

200. Notably, one could not successfully assert that the local hire law impinges the right to travel. The Alaska Supreme Court has consistently distinguished between laws containing *durational* residency requirements, which may infringe one's right to travel, and mere residency requirements, which do not. *Brown*, 687 P.2d at 271; *Gilman v. Martin*, 662 P.2d 120, 125 (Alaska 1983).

201. 565 P.2d 159, 166 (Alaska 1977).

202. *Id.* at 167.

203. *See supra* note 193 and accompanying text.

204. *See supra* note 24.

205. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 322 (Marshall, J., dissenting) (right to employment is "inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence . . . ") (citation omitted).

review and those to which it has applied strict scrutiny. This is the area where federal cases have been most inconsistent"²⁰⁶

Alaska's equal protection analysis still is developing. It is impossible to predict what verbal formulation a court would utilize to apply the second and third steps once the court assigned a level of importance to the right to employment. At the second step, one must ascertain the purpose of the local hire laws. The stated purpose of the act is to reduce unemployment among Alaska residents.²⁰⁷ The court has in the past, however, substituted its own belief as to the purpose of a law.²⁰⁸ One might characterize the act's purpose as protecting local workers from outside competition, a purpose condemned under privileges and immunities analysis in *Francis*.²⁰⁹ If the latter were characterized by the court as the state's true purpose, a local hire law might not withstand scrutiny at the lowest point on the sliding scale, which requires that the state's purpose be legitimate.²¹⁰ Moreover, the fact that Alaska has adopted this sliding scale indicates that the court may apply more than the biteless rational basis test when an interest as important as employment is affected. Therefore, the state may have to show more than the legitimacy of a local hire law's purpose, though how much more is unknown. Notably, the Alaska Supreme Court has characterized reducing unemployment as an important — even compelling — purpose.²¹¹ As a result, should the court characterize this as the act's purpose, the state would then have a strong justification for the statute.

Finally, in the last step of the sliding scale test, the court analyzes the tightness of the means-end fit. The more important the interest assigned in step one, the tighter the fit needs to be. As discussed under privileges and immunities analysis, the statutes are not narrowly tailored.²¹² Privileges and immunities analysis requires a reasonable relationship between means and end, a standard resembling the low end of review under the sliding scale.²¹³ Arguably, therefore, the statute could not satisfy even the lowest test of the sliding scale.

The Alaska equal protection clause could prove a formidable obstacle to the state's new local hire law. The court's sliding scale analysis is a useful and flexible tool by which it may afford close scrutiny to

206. Wise, *supra* note 150, at 44 (footnote omitted).

207. See *supra* note 180 and accompanying text.

208. See, e.g., *Isakson v. Rickey*, 550 P.2d 339 (Alaska 1976).

209. See *supra* note 140 and accompanying text.

210. See *supra* note 197 and accompanying text.

211. *State v. Wyllie*, 516 P.2d 142, 149 (Alaska 1973).

212. See *supra* notes 184-87 and accompanying text.

213. See *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984).

such an employment preference law. Because Alaska's equal protection doctrine still is developing, however, it is difficult to predict exactly what level of scrutiny the Alaska Supreme Court will apply if again faced with an equal protection challenge to a local hire law.

V. CONCLUSION

The legislature has again enacted a local hire law, and again Alaska courts likely will strike down the law under either the article IV privileges and immunities clause or Alaska's equal protection clause. That result is the correct one: although a popular short-term solution, economic protection is not a long-term answer to Alaska's problems. As Mr. Justice Cardozo once observed, the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."²¹⁴

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214. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).